IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Civil First Appeal No.199/1991

Ram Charan Sharma S/o Shri Nek Ram Sharma
(died during the pendency of appeal and substituted by Smt. Sanno W/o Shri Yogesh Chand Pathak)
...Defendant No.1-Appellant
Versus
Suresh Chand Pathak S/o Shri Ram Charan Sharma
...Defendant No.2-Respondent No.1
AND
Yogesh Chand Pathak S/o Shri Ram Charan Sharma
...Plaintiff-Respondent No.2

Date of Judgment ::: 06th December, 2007

PRESENT
HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Shri R.P. Garg with
Ms. Anita Jain, Counsel for defendant-appellant
None present for the plaintiff-respondents

//Reportable//

By the Court:-

Case called for hearing. No one is present on behalf of the respondents.

Heard learned counsel for the appellant.

This regular first appeal under Section 96 of the Code of Civil Procedure, on behalf of the defendant no.1, was filed being aggrieved with the judgment and decree dated 15.07.1991 passed by the Additional District & Sessions Judge No.2, Ajmer, in Civil Suit No.103/83, whereby suit of plaintiff-respondent No.2 Yogesh Chand

Pathak for partition of the disputed property was dismissed by the trial court.

Briefly stated the facts of the case are that plaintiff-respondent No.2 Yogesh Chand Pathak filed a suit for partition in respect of disputed property i.e. plot of land bearing No.25, with adjacent land as described in Para 2 of the plaint, in the court of District Judge, Ajmer, wherein it was pleaded that the disputed property was purchased by Smt. Bhagwati Devi, the mother of plaintiff and defendant No.2 and wife of defendant No.1, from one Daya Shankar Bhargava through registered sale-deed dated 4th May 1967. Smt. Bhagwati Devi was the exclusive owner and in possession of the said property. She expired on 20th July 1978 without having made any gift or 'will' regarding the said property. It was further pleaded that there were three legal heirs of Smt. Bhagwati Devi i.e. her husband Shri Ram Charan Sharma (defendant no.1), elder son Shri Suresh Chand Pathak (defendant no.2) and younger son Yogesh Chand Pathak (plaintiff), thus each heir is entitled to descend 1/3rd share in her property, therefore, a decree for 1/3rd share of plaintiff in the disputed property, be passed.

The defendant no.1 Ram Charan Sharma, in his written statement, admitted the contents of plaint and contended that defendant no.1 is also entitled for 1/3rd share in the disputed property.

The defendant No.2 Suresh Chand Pathak filed a separate written-statement wherein he pleaded that the deceased Smt. Bhagwati Devi had already partitioned the disputed property equally in favour of plaintiff as well as defendant No.2.

The learned trial court, on the basis of pleadings of the parties, framed four issues, which are reproduced in the impugned judgment passed by the trial court.

In support of the case, the plaintiff examined himself as PW-1. The defendant No.1 neither examined himself nor examined any witness on his behalf. Defendant No.2 examined himself as DW-1.

The learned trial court, after considering the submissions of all the parties and examining the evidence available on the record, while deciding Issue No.2, recorded a finding that the disputed property had already been partitioned by late Smt. Bhagwati Devi equally in between plaintiff Yogesh Chand and defendant No.2 Suresh Chand, her both sons, therefore, the disputed property cannot be divided now and consequently decided Issue No.2 in favour of the defendant No.2 and against the plaintiff as well as the defendant No.1. In view of the finding on Issue No.2, the Issue No.3 was also decided by the trial court in favour of the defendant No.2 and against the plaintiff as well as defendant No.1. Consequently, the suit

filed by the plaintiff-respondent no.2 for partition of the disputed property was dismissed vide impugned judgment and decree dated 15.07.1991. Being aggrieved with the same, the defendant no.1 Ram Charan Sharma preferred the present regular first appeal.

During the pendency of this appeal, the sole appellant Ram Charan Sharma expired on 22.06.1992 and an application was filed on behalf of Smt. Sanno Pathak W/o Yogesh Chand Pathak (plaintiff-respondent No.2) for her substitution in place of deceased-appellant Ram Charan Sharma on the basis of registered-will dated 16.03.1985 executed by Ram Charan Sharma in favour of Smt. Sanno W/o Yogesh. The said application was allowed by this Court and name of Smt. Sanno W/o Yogesh Chand was substituted in his place subject to just objection by the respondents.

The learned counsel for the appellant contended that in fact no partition in respect of disputed property took place in between the plaintiff and the defendant no.2, as alleged by defendant no.2, in the year 1976. Had there been any partition took place in the year 1976, it would have been in between four persons alive at that time i.e. the plaintiff, defendant no.1, defendant no.2 and Smt. Bhagwati Devi herself, and each of them could have got 1/4th share in the property and at that time there arose no occasion to partition the disputed property equally in

between two brothers Yogesh and Suresh only. He further contended that if partition would have taken place in the year 1976 then there was no occasion for executing the lease-deed by plaintiff Yogesh Chand Pathak in respect of two rooms of the disputed property in favour of Smt. Bhagwati Devi, therefore, it clearly shows that no partition had taken place in the year 1976 and Smt. Bhagwati Devi died without executing any document whatsoever, hence all the three legal heirs left surviving by her are entitled to 1/3rd share equally in the disputed property and, as such, the trial court has committed an illegality in deciding Issue No.2 and 3, and rejecting the suit of the plaintiff, thus the same is liable to be set-aside and the decree, as prayed for, is required to be passed in the case.

No one is present on behalf of any of the respondents in spite of service of notice of appeal.

I have considered the submissions of learned counsel for the appellant and also examined the impugned judgment as well as the record of the trial court.

There is no dispute in between the parties that the disputed property was purchased by Smt. Bhagwati Devi on 4th May 1957 from Daya Shankar Bhargava through registered sale-deed (Exhibit-1), and she died on 20.07.1978 without executing any document with regard to said property. There

were three legal heirs left surviving by Smt. Bhagwati Devi i.e. her two sons Yogesh Chand and Suresh Chand and her husband Ram Charan Sharma. The case of the plaintiff is that he is entitled for 1/3rd share in the property being legal heir of Smt. Bhagwati Devi whereas defendant no.2 Suresh Chand, another son of Smt. Bhagwati Devi, submitted before the trial court that the disputed property had already been partitioned by Smt. Bhagwati Devi in her lifetime orally in the year 1976 giving equal shares to her both sons i.e. plaintiff Yogesh Chand defendant no.2 Suresh Chand. PW-1 Yogesh Chand, in his statement, has stated before the Court that no partition in respect of disputed property took place, whereas DW-1 Suresh Chand, in his statement, has stated that the disputed property had already been partitioned by her mother equally in between Yogesh Chand and Suresh Chand.

The defendant No.1 Ram Charan Sharma filed his written statement in the trial court supporting the case of plaintiff Yogesh Chand and also claiming his own 1/3rd share in the disputed property but he did not come in witness-box to state on oath that the disputed property was not partitioned by his wife Smt. Bhagwati Devi equally in between his two sons Yogesh Chand and Suresh Chand.

The contention of the learned counsel for the appellant that if partition would have taken place in 1976

then it would have been divided in between all the four persons, cannot be accepted for simple reason that it was the self-acquired property of Smt. Bhagwati Devi and it was for Smt. Bhagwati Devi to give the said property to anyone. She chose to divide the said property in between her two sons - plaintiff and defendant no.2 and nobody could have prevented her to divide the same in between her two sons, therefore, it is unnecessary to contend that if the property would have been partitioned then it would have been partitioned in between four persons only and not only in between two sons.

The other submission of learned counsel for the appellant about execution of lease-deed in the year 1978 by plaintiff in favour of Smt. Bhagwati Devi is concerned, it is relevant to mention that the exact reason for executing the lease-deed has not come on the record but the plaintiff did not plead the said fact in the plaint. PW-1 Yogesh Chand did not state this fact in his examination-in-chief on oath before the trial court, rather he denied this fact in his cross-examination by stating that it is wrong that he took two rooms on rent from his mother during her lifetime. On the other hand, the case of the defendant no.2 from the very beginning was that two rooms were taken by the plaintiff on rent from Smt. Bhagwati Devi and since then he is in possession of the two rooms. Subsequently,

Smt. Bhagwati Devi partitioned the property equally in between her both sons and they are in possession of their respective equal shares. From the statement of PW-1 and DW-1 it appears that the plaintiff wanted to start his factory in his two rooms and he wanted some lease-deed in writing therefore the said lease-deed was executed so the same could have been used by him. Even DW-1 Suresh, in his statement, has specifically stated that no rent was paid by Yogesh Chand to his mother.

The learned trial court has considered the evidence in detail while deciding Issues No.2 and 3 and has recorded a finding that oral partition in respect of disputed property had already been taken place. DW-1 Suresh Chand, in his statement, has specifically stated that at the time of oral partition he, his brother Yogesh, his mother and father, all the four, were present. It is relevant to mention that Ram Charan Sharma was alive during the trial of the suit and he also filed his written-statement but he did not examine himself to state on oath that Smt. Bhagwati Devi, during her lifetime did not partition the disputed property equally in between their two sons. The learned counsel for the appellant is unable to negative the said reasoning recorded by the trial court as to why and under what circumstance Ram Charan Sharma, the defendant no.1-appellant, did not examine himself before the trial court.

Had Ram Charan Sharma come in witness-box, the defendant No.2 Suresh Chand Pathak would have got an opportunity to cross-examine him about oral partition took place in respect of the property, in dispute. Therefore, I do not find any merit in any of the contentions of learned counsel for the appellant. The findings of the learned trial court in respect of Issues No.2 and 3 are absolutely legal and justified and based on the evidence on the record and the same do not call for any interference by this Court in this appeal.

So far as the issue - whether under Hindu law oral partition can be taken place, is concerned, the learned counsel for the appellant rightly conceded that under Hindu Law oral partition is permissible. The learned trial court has also referred two judgments, quoted below, in this regard that oral partition is permissible:-

> **1. Sita Ram Prasad Vs. Mahadeo Rai and Others – AIR 1980 Patna 254**
>
> **2. Most. Marjadi Devi and Others Vs. Jagarnath Singh and Others – AIR 1983 Patna 129**

The Division Bench of Patna High Court in Sita Ram Prasad's case (Supra), in Para No.10, specifically held that -

> **".....It is also well established that under the Hindu law, there can be an oral**

> **partition and once a partition is alleged, then the law will presume, unless something is proved to the contrary, that there was a complete partition between the members of the family. ....”**

The learned counsel for the appellant could not refer any contrary judgment to the above legal position that oral partition of the property in Hindus is permissible.

In view of the above, I am of the view that oral partition in Hindus is permissible and Smt. Bhagwati Devi had already partitioned the disputed property in between the plaintiff Yogesh Chand and defendant No.2 Suresh Chand equally. The learned trial court rightly recorded a finding while deciding Issues No.2 and 3 that defendant No.1 was not entitled to get 1/3rd share in the disputed property as the same had already been partitioned by Smt. Bhagwati Devi who was exclusive owner thereof.

Apart from above on merits of the case, there is one more reason to outrightly reject the present appeal filed by defendant No.1 Ram Charan Sharma. The suit was filed by plaintiff Yogesh Chand claiming 1/3rd share in the disputed property. The defendant No.1, who preferred the present appeal, filed his written-statement to the suit supporting the case of the plaintiff stating therein that each party has 1/3rd share in the disputed property. However, he did

not file any counter-claim seeking a decree from the trial court in his favour for 1/3rd share in the disputed property. A court-fee is required to be paid on counter-claim. Since the defendant no.1-appellant did not file any counter-claim, no court-fee was paid by him. The suit of Yogesh Chand was dismissed by the trial court but he did not prefer any appeal, and the reason behind it is obvious that he wanted 1/3rd share in the disputed property but the trial court declared that the disputed property had already been partitioned by Smt. Bhagwati Devi in between the plaintiff and defendant no.2 equally, therefore, he got ½ share therein. So far as defendant No.1 Ram Charan Sharma, the appellant herein, is concerned, he is not entitled to file the present appeal for the reason that there was no counter-claim on his behalf in the trial court. Had there been any counter-claim on his behalf with required court-fee and the same would have been rejected by the trial court, certainly he could have been an aggrieved-person justifying his filing the present appeal. In absence of separate suit by Ram Charan Sharma or counter-claim on his behalf, with required court-fee, in the present suit, disentitles him to prefer the present appeal against the impugned judgment, whereby the trial court rejected the suit of the plaintiff Yogesh Chand.

In view of the above, I do not find any merit in

this appeal and the same is accordingly dismissed with no order as to costs.

(Narendra Kumar Jain) J.

//Jaiman//
S.No.1 (HS)